

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION - LOS ANGELES)

UNITED STATES OF AMERICA,)	CASE NO: 2:24-cr-00091-ODW-1
)	
Plaintiff,)	CRIMINAL
)	
vs.)	Los Angeles, California
)	
ALEXANDER SMIRNOV,)	Monday, August 26, 2024
)	
<u>Defendant.</u>)	(11:19 a.m. to 12:12 p.m.)

HEARING RE:

MOTION TO DISQUALIFY COUNSEL AS TO SPECIAL COUNSEL
AND MOTION TO DISMISS CASE [DKT.NO.93]

BEFORE THE HONORABLE OTIS D. WRIGHT, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES: SEE PAGE 2

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1 Los Angeles, CA; Monday, August 26, 2024; 11:19 a.m.

2 (Call to Order)

3 THE CLERK: Calling item number 1, 24-CR-91-ODW,
4 United States of America versus Alexander Smirnov. Counsel,
5 please state your appearances starting with the Government.

6 MR. WISE: Good morning, Your Honor, Leo Wise, Derek
7 Hines and Sean Mulryne for the United States.

8 THE COURT: Gentlemen, good morning.

9 MR. WISE: Good morning, Your Honor.

10 MR. CHESNOFF: May it please the court, Your Honor,
11 David Chesnoff, Richard Schonfeld, Naser Khoury and Mark Byrne
12 on behalf of Mr. Smirnov who's present.

13 THE COURT: Thank you, gentlemen.

14 MR. SCHONFELD: Thank you, Your Honor.

15 THE COURT: All right. We're on a motion by
16 Mr. Smirnov to disqualify the Government counsel and to dismiss
17 the indictment.

18 Let me tell you I'm not inclined to dismiss the
19 indictment. I'm not inclined to disqualify Government counsel.
20 I've read your papers and I will hear any additional argument
21 that either side would like to make. Let's begin with the
22 Government.

23 No, never mind. Let's begin with the moving party.
24 Mr. Smirnov.

25 MR. CHESNOFF: Thank you. Your Honor, may I approach

1 that podium?

2 **THE COURT:** Listen, gentlemen, make yourselves
3 comfortable. You can remain seated right where you are, you
4 can use the lectern, whatever makes you happy.

5 **MR. CHESNOFF:** Thank you, Your Honor.

6 **MR. SCHONFELD:** Good morning, Your Honor, Richard
7 Schonfeld on behalf of Mr. Smirnov.

8 **THE COURT:** Mr. Schonfeld, good morning.

9 **MR. SCHONFELD:** Your Honor, as this Court is aware
10 we're moving to dismiss the indictment in this case as a result
11 of the special counsel acting in violation of the Appointments
12 Clause of the United States Constitution, as well as the
13 Appropriations Clause.

14 As to the Appointments Clause, there are three
15 subsets to the argument. The first is that special counsel is
16 acting as an officer of the United States and were not vested
17 with that authority by Congress.

18 The second is that Mr. David Weiss, the special
19 counsel, is acting as United States Attorney in the District of
20 Delaware at the same time as acting as special counsel, which
21 cannot occur as a result of 28 C.F.R. 600.3.

22 The third, is that the Government has failed to
23 establish that the prosecution of Mr. Smirnov falls within the
24 parameters of the order appointing David Weiss as special
25 counsel.

1 As to the Appropriations Clause, we're moving to
2 dismiss the indictment, as Congress has not appropriated funds
3 for the purpose of special counsel license prosecution of
4 Mr. Smirnov. And funding under the Independent Counsel Fund,
5 under 28 United States Code 591 does not apply to these
6 circumstances.

7 Before we get to the substance of the argument, it's
8 important to recognize the history of how David Weiss was
9 appointed in this case and we need not look further than the
10 order that was issued by Judge Scarsi in this district which I
11 will distinguish in terms of the result later on in my
12 argument.

13 In terms of the history, Mr. Weiss began
14 investigating Hunter Biden in 2018 while acting as the United
15 States Attorney for the District of Delaware. As early as
16 summer of 2021, Hunter Biden, through his counsel, was in
17 discussion with United States Attorney's Office for the
18 District of Delaware, as well as Department of Justice, Tax
19 Division counsel regarding potential tax charges.

20 So there were two matters that Mr. Biden was trying
21 to resolve at that point in time. One, was the Department of
22 Justice tax case; and two, was a firearms related charge where
23 venue did lie in the District of Delaware as a result of the
24 allegation that Mr. Biden when applying for the purchase of a
25 firearm, included false information related to the lack of drug

1 use. That is the basis upon which the District of Delaware was
2 involved in that investigation and ultimate prosecution.

3 In July of 2023, Hunter Biden and the Government
4 reached an agreement on the resolution for tax charges, which
5 included a two count misdemeanor guilty plea, as well as a
6 diversion agreement related to the firearms count. Those
7 agreements were lodged with the District Court in Delaware.

8 As part of the agreement, Hunter Biden agreed to
9 waive venue related to the tax charges so that it could proceed
10 to resolution in the District of Delaware. On July 26th, 2023
11 when the parties appeared before the Court in Delaware, the
12 Judge did not accept those agreements. The Judge asked the
13 parties to rework the agreements and the defendant ended up
14 pleading not guilty to the then pending tax charge in the
15 District of Delaware.

16 The parties were unable to reach an agreement. And
17 then on August 11th, 2023 the Attorney General appointed David
18 Weiss as special counsel. That same day, the Government moved
19 to dismiss the tax information in the District of Delaware
20 without prejudice.

21 Special Counsel Weiss then convened a grand jury and
22 pursued prosecution in this district, which led to an
23 indictment of Hunter Biden.

24 The significance of that procedural history is that
25 it becomes quite clear that David Weiss is, to the contrary of

1 independent counsel, he was appointed for the purpose of
2 pursuing the investigation in this district when otherwise he
3 would have no authority to do so. And that's significant when
4 we look at 28 C.F.R. 600.3, which governs the appointment of
5 special counsel.

6 And what it says is specifically, the special counsel
7 shall be selected from outside the United States Government.
8 That did not occur in this case.

9 Now, I will get to the Appointments Clause. I will
10 note that Judge Scarsi's order was entered on April 1st, 2024.
11 Since that time, and specifically on July 1st, 2024, the
12 Supreme Court issued its decision in Trump v United States,
13 which is found at 144 Supreme Court 2312.

14 In the concurring opinion of Mr. Justice Thomas in
15 that case he stated the following, I am not sure that any
16 office of the special counsel has been established by law, as
17 the Constitution requires. By requiring that Congress create
18 federal offices by law, the Constitution imposes an important
19 check against the President. He cannot create offices at his
20 pleasure. If there is no law establishing the office that
21 special counsel occupies, then he cannot proceed with that
22 prosecution.

23 The same issue applies here. Justice Thomas went on
24 to outline how the Constitution sets forth how an office may be
25 created and how it may be filled under the Appointments Clause.

1 He outlined, the default manner for appointing officers of the
2 United States is nomination by the President and confirmation
3 by Senate. He acknowledged that there's a limited exception
4 for appointment of inferior offices, insofar as the Attorney
5 General may be authorized by law to appoint inferior officers
6 without senatorial confirmation.

7 However, he noted, that before the President or the
8 Attorney General can appoint any officer, the Constitution
9 requires that the underlying office be established by law.
10 Established by law refers to an office that Congress creates by
11 statute. That is not what occurred in this case.

12 Justice Thomas continued, quote, by keeping the
13 ability to create offices out of the President's hands, the
14 founders ensured that no President could unilaterally create an
15 army of officer positions to then fill with his supporters,
16 instead our Constitution leaves it in the hands of peoples'
17 elected representatives to determine whether new executive
18 offices should exist.

19 In response to these arguments, the Government
20 asserts that because Special Counsel Weiss was and is the
21 United States Attorney in the District of Delaware he therefore
22 has the congressional and presidential approval that's
23 necessary. And they also assert that the Attorney General can
24 then expand his duties.

25 However, that doesn't address the fact that they have

1 actually created an office. They have multiple attorneys
2 working under that office and just Friday, August 23rd they
3 disclosed a report regarding funding for that office in the
4 millions of dollars that they've spent.

5 **THE COURT:** Did I miss something? Are we talking
6 about the Office of the Special Counsel?

7 **MR. SCHONFELD:** Yes, Your Honor. And that office, in
8 this instance has not --

9 **THE COURT:** You started this off with a reference to
10 600.3, qualifications of the special counsel.

11 **MR. SCHONFELD:** Yes, Your Honor.

12 **THE COURT:** We have a Code of Federal Regulations
13 dealing with this person that you say has been established
14 contrary to the Constitution.

15 **MR. SCHONFELD:** What's the question, Your Honor?

16 **THE COURT:** You said the Office of the Special
17 Counsel is something that apparently has just been made up,
18 that there's nothing in the Constitution that creates such an
19 office.

20 **MR. SCHONFELD:** What I'm saying, Your Honor, is that
21 in order for David Weiss to act as special counsel in this case
22 it required Congress to create the office of this special
23 counsel. And then when we get to the Apportionments Clause, it
24 actually also required them to approve the funding of the
25 office, because the United States Treasury is the one who is

1 supposed to fund this prosecution.

2 **THE COURT:** Okay.

3 **MR. SCHONFELD:** Instead, what the Government has done
4 in this case is use the indefinite fund, where they are taking
5 money from DOJ coffers with unlimited resources and applying it
6 to this special prosecution which is a violation of the
7 Apportionments Clause.

8 And so getting to the Court's question, 28 C.F.R.
9 600.3 which are the regulations once an office of special
10 counsel has been properly created, require that special counsel
11 be from someone outside of the government. And the purpose of
12 that as stated by both Justice Thomas as well as in the
13 opinions that have been rendered in multiple cases that we've
14 cited in our briefing, and Justice Thomas went through the
15 history of it as did Justice Cannon in the District of Florida,
16 is for purposes of having someone truly independent when you're
17 investigating government authorities. And that is not what we
18 have here.

19 So this isn't simply an expansion of David Weiss'
20 authority as the United States Attorney in the District of
21 Delaware. This is the creation of an office of special counsel
22 which was done improperly.

23 **THE COURT:** So you're making this argument on behalf
24 of Hunter Biden?

25 **MR. SCHONFELD:** No, Your Honor, but the way and I'm

1 going to get to that. I might as well now.

2 The actual order of appointment in this case,
3 appointing David Weiss as special counsel was related
4 specifically to number one, the tax investigation and it cites
5 the case number for that from the District of Delaware --

6 **THE COURT:** Against Hunter Biden.

7 **MR. SCHONFELD:** Against Hunter Biden. And number
8 two, the firearms charge against Hunter Biden.

9 And then the order says, and any investigations that
10 arise as a result therefrom. Well what does Mr. Smirnov have
11 to do with someone failing to file their tax returns and what
12 does Mr. Smirnov have to do with someone putting a false
13 statement on an application for a firearm? Nothing.

14 And when we look at the indictment in this case at
15 paragraph 23, it actually references the first contact that the
16 Government had with Mr. Smirnov related to these allegations.
17 And that was contact from the FBI in a district in
18 Pennsylvania. It had nothing to do with the prosecution of
19 Hunter Biden.

20 And to put this into perspective, by hypothetical and
21 by way of example, what would have happened if the Judge in
22 Florida had accepted Hunter Biden's guilty plea agreement on
23 the misdemeanor tax charges and the diversion agreement --

24 **MR. CHESNOFF:** Delaware.

25 **MR. SCHONFELD:** Sorry, Delaware, the District of

1 Delaware. What would have happened if the judge had accepted
2 those resolutions? David Weiss never would have been appointed
3 as special counsel, which exemplifies that not only is he not
4 independent, but that wasn't processed pursuant to the
5 constitutional requirements of appointing special counsel as
6 outlined by Mr. Justice Thomas.

7 Justice Thomas stated quote, it is difficult to see
8 how the special counsel has an office established by law, as
9 required by the Constitution, when the Attorney General
10 appointed the special counsel. He did not identify any statute
11 that clearly creates such an office.

12 And then he went to look at the statutes in that
13 case, which are the exact same statutes applied in this case.
14 Those are 28 United States Code Section 509, 510, 515 and 533.
15 So when we look at the order appointing special counsel in this
16 case those are the four statutes that are relied upon for
17 purposes of the appointment.

18 Justice Thomas recognized that Section 509 and 510
19 are generic provisions concerning the functions of the Attorney
20 General and his ability to delegate authority to any other
21 officer, employee or agency. He found that not to be
22 applicable.

23 Section 515 contemplates an attorney specially
24 appointed by the Attorney General under law, thereby suggesting
25 that such an attorney's office must have already been created

1 by some other law.

2 And as for Section 533, Mr. Justice Thomas stated
3 that it provides quote, the Attorney General may appoint
4 officials to detect and prosecute crimes against the United
5 States, end quote.

6 He then stated it's unclear whether an official is
7 equivalent to an officer as used by the Constitution.
8 Regardless, this provision would be a curious place for
9 Congress to hide the creation of an office for a special
10 counsel.

11 While the courts generally disfavor relying upon an
12 opinion that wasn't official, being a concurring opinion and
13 not directly related to these issues, this is about as close as
14 it can get into viewing what at least one of the Supreme Court
15 Justices would do in these circumstances.

16 Similar findings were entered by Judge Cannon in the
17 Southern District of Florida in United States v Trump on July
18 15th, 2024. So since the time that Judge Scarsi entered his
19 order on April 1st, we have both the concurring opinion by
20 Mr. Chief Justice Thomas and we have a very detailed and
21 lengthy order by Judge Cannon in the Southern District of
22 Florida, where she went through a very thorough analysis of the
23 same issues in this case.

24 In that order, Judge Cannon concluded, quote, none of
25 the statutes cited as legal authority for the appointment, 28

1 U.S.C. 509, 510, 515 and 533 applied. The Court concludes that
2 none vests the Attorney General with the authority to appoint
3 special counsel. And that's what Judge Cannon found.

4 Judge Cannon also addressed the special counsel
5 regulations, which is something that we started with here,
6 which also are cited in this appointment order. The cited
7 sections are 28 CFR 600.4 and 600.10. Curiously, the order in
8 this case, as well as the order in Judge Cannon's case left off
9 600.3 which require under DOJ regulations that the appointment
10 come from outside of the government.

11 The Government takes the position that the
12 regulations cannot be judicially enforced. I would submit to
13 Your Honor that the cases of Accardi v Shaughnessy found at
14 74 Supreme Court 499, the case of Mine Reclamation, 30 F.3d at
15 1519 and the case of Andriasian v INS, 180 F.3d 1033 which is a
16 Ninth Circuit case from 1999 are all cases where regulations
17 have been enforced by the courts.

18 Judge Cannon concluded, distilled down for present
19 purposes, the special counsel regulations mandate that the
20 special counsel be selected from outside the department and
21 then they empower that outside attorney to exercise all
22 investigative and prosecutorial functions of any United States
23 attorney within his jurisdiction. That is not what occurred
24 here. Counsel Weiss was not chosen from outside of the
25 Government.

1 In addition to that, Your Honor, if we look at the
2 actual appointment order as I've referenced, and I'll keep this
3 part brief, this investigation does not fall within the purview
4 of what the Attorney General actually authorized counsel Weiss
5 to investigate.

6 This investigation was created as a result of counsel
7 Weiss being appointed for the purpose of following Hunter
8 Biden's prosecution from the District of Delaware to this
9 district and the investigation of Mr. Smirnov has nothing to do
10 with that investigation and the Government hasn't provided
11 evidence otherwise.

12 **THE COURT:** But the investigation of Mr. Smirnov then
13 uncovered allegations of potential bribery against Mr. Hunter
14 Biden?

15 **MR. SCHONFELD:** So the allegations against
16 Mr. Smirnov is that he made an alleged false statement related
17 to someone having told him that Hunter Biden was being bribed.
18 But that does not fall within the purview of the investigation
19 of either the tax charge or the investigation of the gun
20 charge.

21 **THE COURT:** So during the -- well, the -- are you
22 saying that the FBI was -- should have just simply ignored it,
23 they're investigating taxes and perhaps a gun licensing
24 violation and then they get information regarding a much more
25 serious issue and you're saying they should have ignored that?

1 **MR. SCHONFELD:** I'm not saying it should have been
2 ignored, Your Honor, but I'm not -- what I am saying is that
3 they don't fall from the same investigation, which is what was
4 required in order for Special Counsel Weiss to have the
5 authority to seek a grand jury indictment in this district.

6 **THE COURT:** So when Weiss is undertaking this
7 investigation and he learns of serious criminal activity
8 regarding one of the people he's investigating, what should he
9 have done with that?

10 **MR. SCHONFELD:** Well, Your Honor, the Court
11 respectfully is making an assumption that the information was
12 learned as a result of counsel Weiss investigating Hunter Biden
13 related to the tax case or the gun case.

14 And when you look at the language of the indictment
15 it suggests to the contrary, that the FBI had already initiated
16 this portion of the investigation that resulted in the
17 allegations against Mr. Smirnov.

18 I'm not suggesting that the U.S. Attorney's Office
19 for this district couldn't have brought charges or sought to
20 bring charges against Mr. Smirnov. What I am saying is that it
21 didn't arise from the investigation of the tax case or the gun
22 case, which is the only authority that was vested in counsel
23 Weiss for purposes of prosecuting someone other than Hunter
24 Biden. It had to arise --

25 **THE COURT:** Uh-huh.

1 **MR. SCHONFELD:** -- from those investigations.

2 And the Government has not submitted any evidence to
3 establish that the investigation culminated as a result of
4 counsel Weiss' investigation of Hunter Biden related to the
5 taxes or the firearm. And therefore, he acted beyond the
6 authority given to him by the Attorney General, which as
7 previously stated, still wasn't valid authority.

8 **THE COURT:** But he's -- he is a United States
9 Attorney, correct?

10 **MR. SCHONFELD:** Yes, Your Honor, in the District of
11 Delaware.

12 **THE COURT:** And does he need any other authority to
13 investigate wrongdoing?

14 **MR. SCHONFELD:** He does. He needs additional
15 authority to investigate wrongdoing in another district, Your
16 Honor. The U.S. Attorney, for example, the United States
17 Attorney for the Central District of California couldn't bring
18 a prosecution in the District of Delaware, and that's what's
19 occurred here. And he's been appointed as special counsel and
20 special counsel, as we've already addressed, have special rules
21 that are required to be followed in order to be appointed in
22 that regard.

23 So they gave -- the Attorney General purports to have
24 given David Weiss the authority to pursue prosecution in this
25 district, which otherwise doesn't exist, unless someone is

1 appointed as special counsel and then they have the broader
2 territorial authority. And as I've stated, this wasn't a
3 proper appointment of special counsel.

4 And so the remedy in terms of that -- those three
5 violations, Your Honor, is in fact dismissal. And we don't
6 have to look further than the case of Lucia v Securities
7 Exchange Commission, which is found at 585 United States 237,
8 which is a 2018 Supreme Court decision.

9 In that case, the United States Supreme Court
10 determined that a Securities Exchange Commission Administrative
11 Law Judge that was able to reach a final adjudication violated
12 the Appointments Clause because an ALJ isn't supposed to have
13 that authority. It's supposed to go to the Commission. And
14 what the United States Supreme Court said in that case is that
15 the remedy is to vacate the judgment that had been entered by
16 the administrative law judge.

17 **THE COURT:** Well, we haven't reached that point yet.
18 So right now you object to the way the prosecutor was appointed
19 and that can be remedied by simply making another appointment.

20 **MR. SCHONFELD:** A proper appointment, yes, Your
21 Honor.

22 **THE COURT:** All right. And in terms of the funding,
23 another funding source will remedy that, right?

24 **MR. SCHONFELD:** Well, Your Honor, before you get to
25 there --

1 **THE COURT:** Well, I need to find out some
2 intermediate remedies as opposed to jumping straight to
3 dismissal of the indictment.

4 **MR. SCHONFELD:** So the initial remedy, Your Honor, is
5 true, would be disqualification of special counsel. But what
6 I'm --

7 **THE COURT:** Which is what you asked for.

8 **MR. SCHONFELD:** Yes. But what I'm arguing to, Your
9 Honor, is that if you look at the holding in Lucia v SEC, in
10 that case it was an Appointments Clause problem, where an
11 administrative law judge was given too much authority beyond
12 what was permissible under the Constitution and the laws. And
13 the Supreme Court found that the remedy was to undo what had
14 been done illegally.

15 **THE COURT:** Okay.

16 **MR. SCHONFELD:** In this instance, going to the grand
17 jury without authority and securing an indictment, in order to
18 undo that, Your Honor, you would have to dismiss the indictment
19 and it can be without prejudice. But the remedy, if you follow
20 the analysis in Lucia v SEC, would in fact, be dismissal of the
21 indictment.

22 **THE COURT:** Uh-huh.

23 **MR. SCHONFELD:** Going to the Apportions Clause, the
24 irony here, Your Honor, is that special counsel is drawing
25 funds from what's called an indefinite fund within the

1 Department of Justice which was created to pay all necessary
2 expenses of investigations and prosecutions by quote,
3 independent counsel.

4 And when you go through the history that I just
5 outlined for the Court, counsel Weiss being appointed is the
6 polar opposite of independence. He was appointed because
7 continuity, he had already been the prosecutor in the District
8 of Delaware, but no longer had venue in Delaware to prosecute
9 over the tax charges. So it's the opposite of being
10 independent.

11 **THE COURT:** What about that makes him lack
12 independence?

13 **MR. SCHONFELD:** Because independent counsel is
14 supposed to be someone from outside of the government that has
15 checks and balances and has to report, but is truly independent
16 of the government. Here you have someone who is already a
17 United States Attorney in Delaware who was already prosecuting
18 Hunter Biden for an alleged crime within his district, who is
19 then appointed so that he can prosecute him in another
20 district. That's not independent, Your Honor.

21 **THE COURT:** I think the independent requirement is
22 primarily to address conflicts of interest. But go ahead.

23 **MR. SCHONFELD:** Okay. Your Honor, the Apportions
24 Clause sets forth a straight forward and explicit command. No
25 money can be paid out of the Treasury unless it has been

1 appropriated by an act of Congress. An appropriation must be
2 expressly stated.

3 **THE COURT:** Is this addressing my question as to why
4 not another funding source solve this issue?

5 **MR. SCHONFELD:** Well, it would -- first of all, it
6 would solve the appropriations issue --

7 **THE COURT:** Uh-huh.

8 **MR. SCHONFELD:** -- but it would have to be a
9 congressional funding source. That's what's required under the
10 law for under the Appropriations Clause in order to fund the
11 special counsel's office. Any time that you want to draw from
12 the Treasury, it has to be approved by Congress and that's
13 what's supposed to happen when a truly special counsel is
14 appointed. And that's not what occurred in this case. And
15 Judge Cannon analyzed this issue as well in terms of the funds
16 coming from the indefinite fund for independent counsels and
17 found that it was, in fact, in violation of the Appropriations
18 Clause.

19 In United States v Pisarski, which is a Ninth Circuit
20 case, what the Court did was enjoined expenditures on a case as
21 a result of no appropriations being permitted in the
22 prosecution. And that's what would have to occur here, Your
23 Honor. If the Court's going to grant a remedy for finding a
24 violation of the Appropriations Clause, it would be to enjoin
25 any further spending on this prosecution from the indefinite

1 fund, and then it would require the Government to go to
2 Congress and get approval, which is required under Treasury
3 law.

4 And in Pisarski what it was, Your Honor, is during
5 the time where state law permitted medical marijuana
6 dispensaries they came out with a DOJ mandate that you couldn't
7 prosecute them as long as they were complying with state law.
8 And some individuals were, in fact, prosecuted in violation of
9 that mandate.

10 **THE COURT:** Who were in fact complying with state
11 law.

12 **MR. SCHONFELD:** They were in fact complying with the
13 state law. And that's where the Ninth Circuit said that the
14 appropriate remedy because there were no appropriations for
15 purposes of funding that prosecution was to enjoin further
16 expenditures. And that would be the remedy here that the Court
17 was inquiring about in terms of the funding of the prosecution.

18 Finally, Your Honor, I just want to address in
19 anticipation of one of the Government's arguments, the Nixon
20 case. And I submit to Your Honor, that the Nixon case which
21 the Government relies upon for purposes of the ability to
22 appoint special counsel was in fact dicta.

23 And Judge Cannon in her order spent a lengthy portion
24 of the opinion analyzing how and why the Nixon case is dicta.
25 And in that order, she looked at the briefing in the Nixon case

1 and she found that the issue of Appointments Clause and the
2 Attorney General having any statutory authority to appoint
3 special counsel was never raised, never addressed, and
4 therefore, the passing reference to it in the Nixon case, is in
5 fact, dicta and shouldn't bind this Court.

6 And with that, Your Honor, I respectfully submit that
7 the indictment should be dismissed and if the Court does not
8 dismiss the indictment, then at a minimum, the Government
9 should be enjoined from using the indefinite fund for purposes
10 of prosecuting this case.

11 **THE COURT:** All right. Thank you, sir.

12 **MR. WISE:** Your Honor, may it please the Court.

13 Counsel spent a great deal of time talking about
14 Justice Thomas' solo concurrence in the presidential immunity
15 case, as if it were a decision of the Court. It was not. It
16 was, in fact, a decision that was not joined by a single other
17 member. And it is only Justice Thomas that believes the Office
18 of Special Counsel must be created by statute. That is not
19 what the Supreme Court has said. That is not what any other
20 court has said.

21 And, of course, the Florida District Court opinion
22 which is nonprecedential, it is our position and I will
23 articulate why is wrong. What these two opinions, neither of
24 which is binding on this Court, have in common is that their
25 analysis is rooted in separation of powers principles. And in

1 the case of the Florida District Court it concluded incorrectly
2 that the appointment of the special counsel in that case
3 offended the principle -- those such principles and violated
4 the Appointments Clause because the special counsel in that
5 case was not appointed by the President and confirmed by the
6 Senate.

7 Here, of course, that is not the case. Special
8 Counsel Weiss was nominated by a President and confirmed by the
9 United States Senate as United States Attorney for the District
10 of Delaware in the previous administration and asked to remain
11 in that position when the current administration took office.

12 That means that the Appointments Clause and the
13 separation of powers concerns articulated in the Florida
14 District Court opinion and by Justice Thomas are not implicated
15 in this case.

16 And it almost goes without saying that because the
17 Appointments Clause is not implicated here, the defendant's
18 motion to dismiss, which argues that Special Counsel Weiss's
19 appointment as special counsel violates the Appointments Clause
20 should be denied.

21 Neither Justice Thomas in his concurrence nor the
22 Florida District Court addressed in any way a special counsel
23 who had been nominated by a President and confirmed by the
24 Senate. There is nothing in either opinion, neither of which
25 is binding on this Court that supports the defendant's motion.

1 It's simply apples and oranges.

2 And defendant's own citations to the Florida District
3 Court opinion makes that clear. This is from their brief where
4 Judge Cannon wrote, if the political branches wish to grant the
5 Attorney General power to appoint Special Counsel Smith to
6 investigate and prosecute this action, with the full powers of
7 the United States Attorney, there is a valid means by which to
8 do so. He can be appointed and confirmed through the default
9 method prescribed in the Appointments Clause as Congress has
10 directed for United States Attorneys throughout American
11 history or Congress can authorize his appointment through
12 enactment of positive statutory law, consistent with the
13 Appointments Clause.

14 Special Counsel Weiss, when he was appointed special
15 counsel had, to quote Judge Cannon, quote, the full powers of
16 the United States Attorney because he was and remains a United
17 States Attorney. And he was given those powers, again to quote
18 Judge Cannon through the default method prescribed by the
19 Appointments Clause, namely he was nominated by a President and
20 confirmed by the Senate.

21 So that's where any parallels to Justice Thomas' solo
22 concurrence and the Florida District Court opinion and on that
23 basis alone, the defendant's motion should be denied.

24 But as to that latter phrase they quote, or Congress
25 can authorize this appointment through enactment of positive

1 statutory law consistent with the Appointments Clause. That is
2 also satisfied. Even if Special Counsel Weiss were not a
3 sitting United States Attorney at the time of his appointment,
4 Congress has authorized his appointment through the enactment
5 of positive statutory law consistent with the Appointments
6 Clause.

7 Special Counsel Weiss, like the special counsel in
8 the Florida case, and numerous other special counsels was
9 appointed prior -- who was appointed prior to him pursuant to
10 28 U.S.C. 509, 510, 515 and 533. Those statutes are expressly
11 cited in the Attorney General's August 11th, 2023 appointment
12 order for Special Counsel Weiss.

13 And every court, every court with the sole exception
14 of the Florida District Court that has ever addressed whether
15 those statutes confer on the Attorney General, the power to
16 appoint a prosecutor with the powers that Special Counsel Weiss
17 is currently exercising, regardless of the label you apply has
18 concluded they do. And when I say every court has, that
19 includes the United States Supreme Court.

20 In United States v Nixon, the Supreme Court held that
21 under the authority of Article 2, Section 2 Congress has vested
22 in the Attorney General the power to conduct the criminal
23 litigation of the United States Government. And then this is
24 the key, it has also vested in him the power to appoint
25 subordinate officers to assist him in the discharge of his

1 duties, citing the same statutes that are in the August 11th
2 appointment letter, namely 509, 510, 515 and 533.

3 And the Supreme Court in Nixon, not a solo
4 concurrence, but the Court went on to say, acting pursuant to
5 those statutes the Attorney General has delegated the authority
6 to represent the United States in these particular matters to a
7 special prosecutor with unique authority and tenure. This is
8 binding precedent on all courts in the United States, including
9 the Florida District Court.

10 And the fundamental flaw in the Florida District
11 Court opinion was to conclude that the language I just quoted
12 was dicta, and therefore not binding. But that conclusion is
13 incorrect.

14 As we argue in our opposition and this is the test
15 for whether something is a holding or dicta, whether the
16 Attorney General's statutory authority to promulgate the
17 regulations appointing the independent counsel was quote, a
18 necessary antecedent, was quote, a necessary antecedent to
19 determining whether the regulations were valid and therefore
20 was necessary to the decision that a judiciable controversy
21 existed.

22 That's why it's a holding and not dicta. And we
23 cited three opinions from the United States District Court from
24 the District of Columbia, all that have specifically reached
25 that conclusion that this language was binding precedent and

1 not dicta.

2 Now, the bottom line, Your Honor, is no court has
3 ever found that the appointment of a Presidentially appointed
4 and Senate confirmed U.S. Attorney as special counsel violates
5 the Appointments Clause.

6 Judge Cannon didn't find that, Justice Thomas didn't
7 even address it. And every Court that has examined whether 28
8 U.S.C. 509, 510, 515 and 533 confer on the Attorney General the
9 authority to appoint a special counsel with the powers that
10 Special Counsel Weiss has in this case, including the Supreme
11 Court has concluded they do.

12 The only exception, the only outlier is the Florida
13 District Court opinion and that decision, because it is based
14 on an incorrect reading of Nixon is wrong.

15 As to their second argument, DOJ regulations do not
16 require that Special Counsel Weiss be from outside the
17 government. Defendant argues that 28 C.F.R. 600.3 requires
18 that Special Counsel Weiss be from outside the government. But
19 that argument ignores the fact that Special Counsel Weiss was
20 not appointed pursuant to 600.3. Instead, he was appointed
21 again pursuant to 28 U.S.C. -- these are statutes, not
22 regulations, 509, 510, 515, 533.

23 And more fundamentally their argument ignores,
24 doesn't even address the fact that the law recognizes two
25 distinct types of agency regulations as described by the

1 Supreme Court and we cite this in our brief in Chrysler Corp. v
2 Brown. On the one hand, there are substantive rules and then
3 second, there are interpretive rules, general statements of
4 policy or rules of agency, organization, procedure or practice.

5 The first category, substantive rules affect
6 individual rights and obligations. That's how the Supreme
7 Court described them and are binding, because they have the
8 force and effect of law. And substantive rules must be
9 promulgated according to the procedural requirements imposed by
10 Congress, notably the notice and comment procedures set forth
11 in the Administrative Procedures Act.

12 Meanwhile, the second category, interpretive rules,
13 general statements of policy, or rules of agency organization,
14 procedure or practice are exempted from the notice and comment
15 requirements.

16 The Justice Department in promulgating the special
17 counsel regulations here was unambiguously clear that they are
18 not substantive rules. Section 600.10 explicitly states that
19 the regulations are quote, not intended to, do not, and may not
20 be relied upon to create any rights, substantive or procedural,
21 enforceable at law or equity.

22 And the special counsel regulations were not subject
23 to notice and comment under the APA which they would have had
24 to have been if they were substantive rules. Four courts have
25 already held that the special counsel regulations including

1 600.3 are not substantive rules, and therefore, do not create
2 judicially enforceable rights.

3 Judge Noreika in the Hunter Biden gun case in
4 Delaware, which is referred to as Biden 1 in our brief, Judge
5 Scarsi here in the Central District of California in the Hunter
6 Biden tax case, which is referred to as Biden 2, and two
7 decisions in the case against Paul Manafort in the District of
8 Columbia -- in the District Court for the District of Columbia,
9 which arose out of Special Counsel Mueller's investigation,
10 reached the same conclusion.

11 Defendant doesn't cite a single opinion of any court
12 that found 600.3 created a substantive rule. And the cases he
13 cited Mine Reclamation Corp. v FERC, Andriasian v INS, and
14 Accardi all involved substantive rights, not the kind of
15 procedural, what are referred to as housekeeping rules that are
16 at issue here.

17 Now, on this point, the defendant argues that the
18 Supreme Court's decision in Nixon obligates the Attorney
19 General to only appoint special counsels from outside the
20 government. But again, both Judges Scarsi in the Hunter Biden
21 tax case and Judge Berman Jackson in what we refer to as
22 Manafort 2 rejected that very argument.

23 And Nixon wasn't a case where a criminal defendant
24 was attempting to enforce an agency regulation against the
25 agency, let alone a non-substantive rule. Nixon involved an

1 interagency dispute between the President and the special
2 prosecutor over the availability of executive privilege and the
3 validity of the special prosecutor's subpoena.

4 And as the district court -- the D.C. District Court
5 concluded in Manafort 1 the Supreme Court has quote, made clear
6 in the criminal context that a court need not enforce an
7 agency's internal rules when the agency was not required by the
8 Constitution or by statute to adopt any particular rules or
9 procedures. And that's the United States Supreme Court's
10 decision in Suserous (phonetic) that we cite.

11 So again, bottom line where the Supreme Court has
12 addressed the kind of rule at issue in this case, in Suserous,
13 it has rejected the defendant's argument. And even if, even if
14 which no court has ever said 600.3 was a substantive
15 enforceable rule that was somehow binding on the Attorney
16 General, he also had the authority which he used, which Nixon
17 blessed to appoint Special Counsel Weiss pursuant to 28 U.S.C.
18 509, 510, 515 and 533.

19 And Judge Scarsi in Biden 2 held that the regs on the
20 one hand, the 600.3 through .10 regs and these statutes, 509,
21 510, 515 and 533 are independent bases on which the special
22 counsel's authority rests.

23 The last point I will address is the defendant's
24 argument in his brief that this case somehow presents a
25 conflict of interest because the lies that the defendant told

1 in this case were directed at the current President and somehow
2 that could only be addressed by an outside counsel. I think
3 the conduct of the Office of Special Counsel Weiss in this case
4 has demonstrated that we are independent and that we follow the
5 facts and the law wherever they lead.

6 We've sought indictments against Hunter Biden, the
7 son of the current President in two separate cases, a felony
8 gun charge in Delaware and a felony tax case here in the
9 Central District of California. We have also sought an
10 indictment against the defendant in this case who lied and made
11 false accusations that Hunter Biden and the President accepted
12 bribes from a foreign company.

13 In the gun case and the tax case, defense counsel,
14 without any proof accused us of working at the direction of
15 congressional Republicans. And the judges in both those cases
16 held that those claims were baseless.

17 And in this case, by contrast, defense counsel's
18 conflict argument means we must somehow be working at the
19 direction of the White House and they offer no basis for those
20 accusations either, because none exists.

21 The fact that both defendants, Hunter Biden and
22 Alexander Smirnov accused us of working for the political
23 opponents is proof that politics has nothing to do with either
24 of these cases.

25 As to their Appropriations Clause argument, which

1 they refer to as the independent counsel appropriation, that
2 doesn't exist. This is referred to as indefinite appropriation
3 which funds investigations and prosecutions by independent
4 counsel appointed by the Lapsed Independent Counsel Act, and
5 then a phrase that counsel never uttered, although is in the
6 indefinite appropriation, or other law.

7 And for all of the reasons I gave, including the
8 Supreme Court's decision in Nixon, those statutes 509, 510, 515
9 and 533 are other law, under which the appropriation is proper.

10 Judge Noreika in Delaware and Judge Scarsi here in
11 the Central District of California have rejected the exact
12 argument they make here in regards to Special Counsel Weiss.
13 And a D.C. District Court has rejected this argument in regards
14 to the prosecution of Roger Stone, which we cite, which arose
15 out of the Mueller investigation.

16 And as we explained in our brief, the Attorney
17 General has drawn on several statutory provisions in Title 28,
18 again the other law, to delegate Special Counsel Weiss the
19 authority to pursue this prosecution and to name him as special
20 counsel. And three Attorneys General have used this permanent
21 appropriations to fund special counsels that were appointed
22 either through the Ethics and Government Act, which has lapsed,
23 the old independent counsel statute, but also sitting United
24 States Attorneys at the same time, which also undercuts their
25 argument that 600.3 requires that a special counsel be outside

1 the government.

2 United States Attorney Fitzgerald was a sitting
3 United States Attorney. United States Durham, United States
4 Attorney Durham was a sitting United States Attorney and there
5 were both named special counsel prior to Special Counsel Weiss.

6 As we also detail in our brief, the Government
7 Accountability Office has -- which is an arm of Congress has
8 audited the use of the permanent appropriation and found it to
9 be proper. And as the law recognizes in Rutherford which we
10 cite, once an agency statutory construction has been fully
11 brought to the attention of the public and Congress, and the
12 latter has not sought to alter that interpretation, although it
13 has amended the statute in other respects, then presumably the
14 legislative intent has been correctly discerned.

15 Now again, as Your Honor zeroed in on, even assuming
16 the appropriations does not -- the appropriations isn't proper,
17 dismissal is not appropriate. And here the errors, which there
18 are none, of which the defendant complains, does not require
19 dismissal, nor would dismissal be appropriate.

20 And to Your Honor's question about whether there
21 would be an intermediate remedy, just to briefly address that,
22 I'm a United States Attorney from the District of Maryland.
23 Mr. Hines is a United States Attorney from the Eastern District
24 of Pennsylvania. Mr. Mulryne is a trial attorney with the
25 Criminal Divisions Office of Public Integrity and Mr. Rigali,

1 who's not here with us today, is a trial attorney in the
2 National Security Division.

3 We're all paid by the Department of Justice. The
4 only funding mechanism that exists is for a reimbursement of
5 those funds. But if we're just getting practical as Your Honor
6 asked, we're all drawing a paycheck from these offices anyway,
7 and the question is whether the indefinite appropriation would
8 be used to refund or backfill those payments. But you're
9 looking at the prosecutors who brought this case and we were
10 all prosecutors with the Department of Justice before this case
11 began and we're all be prosecutors when we're done and our
12 paychecks are paid frankly back home by the districts or
13 offices we come from.

14 The last argument which I'll address briefly is their
15 argument that the appointment order somehow doesn't authorize
16 this case. And in some ways, this is the easiest to dispense
17 with.

18 The appointment order is not limited to a tax case
19 and a gun case. They're simply ignoring the plain language of
20 that order. In that order, the Attorney General says in 2019,
21 United States Attorney David C. Weiss, along with federal law
22 enforcement partners, began investigating allegations of
23 certain criminal conduct. It doesn't say just taxes, doesn't
24 say just a gun violation by, among others, among others, Robert
25 Hunter Biden. That investigation includes and it cites the two

1 cases that were public as of the time of this filing, the gun
2 case in Delaware and the tax case in Delaware.

3 It then goes on to say the special counsel is
4 authorized to conduct the ongoing investigation described
5 above, which again is couched as certain criminal conduct by,
6 among others, Robert Hunter Biden, and as well as any matters
7 that arose from that investigation or may arise from the
8 special counsel's investigation, or that are within the scope
9 of 600.4.

10 Defense counsel has simply no idea what was within
11 the purview of investigators at the time this order was
12 entered. Obviously there had been public charges brought in
13 the tax case and the gun case, but he's speaking as if he knows
14 that that is all that was being investigated and he spent some
15 time talking about the plea hearing in Delaware. And, in fact,
16 as is on the public record, part of what led to that plea not
17 being pursued was a back and forth between the Court and the
18 parties that made it clear that the immunity provision was not
19 limited to only taxes and the gun, and in fact, there were
20 other investigations that were pending, including as the
21 indictment makes clear, an investigation into the allegations
22 that Mr. Smirnov had made against Robert Hunter Biden, that we
23 then learned were false and fraudulent. And out of that
24 investigation, the charges against him were brought.

25 And so there's nothing in the appointment order that

1 gives support to their argument. They try to contrast it and
2 say the Jack Smith appointment order is broader, that's simply
3 not true. The Jack Smith appointment order, like this one,
4 references two public investigations, in that case the election
5 interference case and the classified documents case, but then
6 it includes the same language, exactly the same language that
7 is referenced here namely, as well as any matters that arose or
8 may arise directly from this investigation.

9 So it is simply not the case that this investigation
10 was ever so limited. Further, defense counsel's statement that
11 a United States Attorney could not bring -- that Mr. Weiss
12 would not be authorized to bring this case here, simply
13 reflects a misunderstanding of the organization of the Justice
14 Department.

15 United States Attorneys routinely prosecute cases in
16 other districts. For instance, when a U.S. Attorney's office
17 is recused and recusals happen in due course. I worked for the
18 United States Attorney in Maryland when he brought a case in
19 the District of Columbia. He was not a special counsel. He
20 was given authority under 515, which is the mechanism by which
21 recusals are authorized and investigations outside of a
22 district can be authorized because that statute says that a
23 United States Attorney can bring a case in a district in which
24 they're not resident. And that is an alternative basis that
25 the Attorney General cited again in the appointment order for

1 Special Counsel Weiss.

2 Counsel mentions the Lucia opinion, again back to my
3 original argument, Lucia involved an administrative law judge,
4 not a Presidentially appointed and Senate confirmed officer of
5 the Department of Justice. Therefore, if there is an
6 appropriations clause issue in Lucia it tells us nothing about
7 the issue before this Court or the issue that has been
8 addressed in Judge Scarsi's courtroom, in Judge Noreika's
9 courtroom, in the District Court in D.C. in Stone and Manafort
10 where all of those appointments were found to be lawful and
11 valid.

12 Finally, counsel mentioned Pisarski. They obviously
13 haven't moved to enjoin the prosecution in this case. They
14 chose to move to dismiss and disqualify as Your Honor has
15 pointed out. And from a practical standpoint, you know,
16 thankfully we're all getting paid one way or the other. But if
17 there were some issue, it would be addressed not by the
18 draconian step of dismissing the indictment, it theoretically
19 could be addressed with a direction, for instance, that the
20 reimbursement not occur, which is a rounding error in the
21 budget of the Department of Justice that nowhere near the
22 remedy the defendant seeks in this case, which is not justified
23 by the facts or the law. Thank you, Your Honor.

24 **THE COURT:** Thank you, counsel. All right. On
25 behalf of Mr. Smirnov, is there any additional comments with

1 respect to elaborating on the conflict of interest issue?

2 **MR. SCHONFELD:** Your Honor, in responding to the
3 Court's inquiry regarding the conflict of interest issue, I
4 think it needs to be noted regardless of whether the special
5 counsel office is pursuing prosecution of the President's son,
6 that's not the President.

7 And in this case, you have the President who appoints
8 the Attorney General. You have the Attorney General who has
9 granted the authority to counsel David Weiss, who's the
10 prosecutor for the District of Delaware to then prosecute
11 Mr. Smirnov with the alleged victim being the President.
12 That's the conflict of interest issue.

13 **THE COURT:** You completely lost me there. I'm not
14 seeing a straight line here.

15 **MR. SCHONFELD:** Okay. From the President to the
16 Attorney General. The Attorney General appoints David Weiss.
17 David Weiss prosecutes Mr. Smirnov. And the victim allegedly
18 of Mr. Smirnov's crime is the President. That's the conflict.

19 So the President has effectively appointed the
20 prosecutor to prosecute Mr. Smirnov, when the President is the
21 victim. And that defeats the entire structure of the special
22 counsel's office as analyzed in all of the cases that we've
23 cited in the briefing, Your Honor.

24 **THE COURT:** Are we forgetting all about the
25 prosecutions of Hunter Biden?

1 **MR. SCHONFELD:** Hunter Biden is not the President,
2 Your Honor. And we can't just say --

3 **THE COURT:** All right.

4 **MR. SCHONFELD:** -- because the special counsel is
5 also prosecuting Hunter Biden there's no conflict of interest
6 in them prosecuting Mr. Smirnov when the victim is the
7 President and the President appointed the Attorney General, who
8 appointed David Weiss.

9 **THE COURT:** Okay.

10 **MR. SCHONFELD:** Your Honor, if I could just have two
11 more minutes I want to address a couple of arguments the
12 Government --

13 **THE COURT:** No, you addressed what I asked you to
14 address. That's what I was interested in.

15 **MR. SCHONFELD:** May I just briefly, Your Honor?

16 **THE COURT:** Go ahead.

17 **MR. SCHONFELD:** I would like to, if the Court would
18 permit, I can file this as a supplement, but this is the
19 special counsel's office statement of expenditures for October
20 1st, 2023 through March 31st, 2024, it just came out on Friday.

21 And the significance of that, Your Honor, is it
22 establishes that counsel David Weiss is not acting as the
23 United States Attorney for the District of Delaware. The
24 Government pointed out in their response argument that you've
25 got four lawyers from different districts here prosecuting

1 Mr. Smirnov. And I think that that is evidence in itself that
2 this is a function of a special counsel office, not a function
3 of expanded authority for the United States Attorney in the
4 District of Delaware. And as a result of that, the
5 Appointments Clause clearly applies.

6 And when we look, although not binding authority,
7 Mr. Justice Thomas' concurring opinion the analysis is the
8 same, Your Honor. And the analysis makes it clear that
9 Sections 509, 510, 515 and 533 don't apply.

10 And the last thing -- two more things I'd like to
11 say. The last -- second to last, Your Honor, is that in the
12 order appointing special counsel in this case, there's express
13 references to 28 United States Code Section -- sorry, 28 CFR
14 Section 600.4 through 600.10. Those are the regulations
15 related to special counsel.

16 At 600.3 that requires that special counsel be
17 appointed from outside of the government. So on the one hand
18 the Government wants to rely upon the authority granted them
19 under 600.4 through 600.10, but on the other hand, they want
20 the Court to disregard 600.3 that requires the appointment be
21 from outside of the government.

22 The last issue, Your Honor, is the scope of the order
23 and the Government stated as they stood here that defense
24 counsel has quote, no idea what investigation existed and
25 culminated in the prosecution of Mr. Smirnov. Well, we filed a

1 motion to dismiss. And we have asserted that the prosecution
2 of Mr. Smirnoff is beyond the scope of what was authorized by
3 the Attorney General, if in fact, the order authorizing special
4 counsel is valid.

5 It's the Government's burden to establish that their
6 prosecution of Mr. Smirnov falls within the parameters, the
7 four corners of the order appointing counsel Weiss and they've
8 made no effort to do that. Thank you, Your Honor.

9 **THE COURT:** Thank you.

10 **MR. SCHONFELD:** May I file this supplement just
11 electronically, Your Honor?

12 **THE COURT:** If you wish.

13 **MR. SCHONFELD:** Thank you very much.

14 **THE COURT:** All right. The Court's tentative stance
15 is the order of the Court. The Government makes the better
16 argument here. So the requested relief is denied.

17 Thank you, gentlemen.

18 **MR. WISE:** Thank you, Your Honor.

19 **THE CLERK:** This court is in recess.

20 **(Proceedings concluded at 12:12 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



Signed

August 29, 2024

Dated

TONI HUDSON, TRANSCRIBER